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[ORIGINAL CIVIL JURISDICTION]

McELWAINE, C.J.

January 27, 1940.

IN RE K. MOHAMED IBRAHIM & COMPANY. *EX PARTE* RAMCHAND.

[SINGAPORE BANKRUPTCY No. 503 of 1939]

Bankruptcy Ordinance, s. 24, sub-s. 1—Act of bankruptcy—Notice of suspension of payment—Power of co-partner to commit act so as to bind his co-partners.

There were three partners in the firm of K. Mohamed Ibrahim & Co. Two of such partners were at all material times resident in India outside the jurisdiction. The third partner being then within the jurisdiction sent out a circular letter to all the creditors of the firm which began as follows:—"We regret to have to inform you that we are unable to pay our debts in full at the present time and we propose to call a meeting of all our creditors. We contribute our failure to general lack of business". Then they went on to propose liquidation of assets and payment of dividends to creditors and named the time and place for the meeting of the creditors. The letter was signed "K.S. Shaik Mohamed" (the partner within the jurisdiction) under a rubber stamp impression bearing the name of the firm.

Held, that this was clearly a notice of general suspension of payment of all creditors and the giving of this letter was an act of bankruptcy.

Held also, that an act of bankruptcy of this kind is a personal act or default and cannot be committed through an agent or co-partner without the authorisation and cognizance of the other partners. This being so there could not be a Receiving order made against the firm since under s. 24, sub-s. 1 of the Bankruptcy Ordinance such an order would automatically result in an adjudication order of all partners. A receiving order or adjudication order in such circumstances could only be made against such of the partners as had individually committed or expressly authorised the act of bankruptcy.

Cases referred to:—

(1) *Re Abdulla,* (1938) S.S.L.R. 193; 7 M.L.J. 130.

(2) *Exparte Blain,* 12 Ch. D. 522.

(3) *Cooke v. Vogeler,* (1901) A.C. 102.

(4) *In re Crispin,* 8 Ch. App. 374.

(5) *Crook v. Morley,* (1891) A.C. 316.

(6) *In re a Debtor,* (1936) 1 Ch. 165.

(7) *In re a Debtor* (No. 24 of 1935), (1936) 1 Ch. 292.

(8) *The Debtors* (No. 807 of 1922), 92 L.J. Ch. 120.

(9) *Re Chop Gee Lee,* Singapore Bankruptcy No. 362 of 1923.

(10) *Re a Judgment Debtor,* (1937) 1 Ch. 137.

(11) *Re Leong Cheong & Co.,* (1930) S.S.L.R. 155.

(12) *Re Moona Roona Kana,* 4 S.S.L.R. 80.

(13) *Nam Chiang Long (Chop),* (1927) S.S. L.R. 28.

PETITION.

R. H. Green for petitioning creditor.

H. D. Mundell for the debtor.

The facts and arguments sufficiently appear from the judgment.

Cur. Adv. Vult.

McElwaine, C.J.—This is a creditor's petition that a receiving order be made in respect of the estate of K. Mohamed Ibrahim & Company (hereinafter referred to as the debtor) and the act of bankruptcy alleged is that the debtor on or about the 19th day of December, 1939, gave notice that they were about to suspend payment of their debts. This notice was contained in a letter copies of which were sent by the debtor to various creditors.

The petition is opposed on two grounds:

(1) that the letter of the 19th December is not a notice that the debtor had suspended or that he was about to suspend payment of his debts within s. 3, sub-s. 1 (g) of the Bankruptcy Ordinance;

(2) that the letter being signed by only one partner of the debtor firm, and not being signed by two other persons (who at the date of the alleged act of bankruptcy were in India and who for the purposes of the motion I must take to be partners) it cannot constitute an act of bankruptcy by the firm.

There is no set form in which a notice of suspension of payment must be given. In *Crook v. Morley*[5] the Earl of Selborne L.C. adopts the words of Bowen L.J. when he asked '"What effect would the circular produce on the mind of a creditor receiving it as to the intention of the debtor with regard to his creditors?"' That is the test. Lord Watson said "It therefore appears to me that any notice will be sufficient for the purposes of the subsection which is expressed in terms calculated to convey to its recipients the information that their debtor has suspended or is about to suspend payment of his debts".

I do not propose to set out the whole of this letter which is clearly a circular letter, but it begins "We regret to have to inform you that we are unable to pay our debts in full at the present time and we propose to call a meeting of all our creditors. We contribute our failure to general lack of business". It then stated that its unsecured liabilities amounted to $30,500/- and its assets $9,418.52 apart from 5½ acres held by a chetty as security, an asset of no value to the unsecured creditors. "It is proposed that the stock-in-trade and book debts shall be taken over by a third party at a price which will provide sufficient funds for payment of 20% to the creditors". It named a time and place for the meeting of creditors. This letter is much more than an expression of inability to pay debts. It is to my mind clearly a notice of general suspension of payment of all creditors, and a proposal to pay them a percentage of what he owed them, and the giving of this letter was an act of bankruptcy.

The letter was signed by a partner K. M. Shaik Mohamed under a rubber stamp impression "K. Mohamed Ibrahim & Co." and Mr. Battishill argued that an act of bankruptcy of this kind being a voluntary act must be the act of all the partners to render it an act of bankruptcy by the firm.

Section 5 of the Partnership Act 1890 enacts that every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners unless the partner so acting has in fact no authority to act for the firm in the particular matter and the person with whom he is dealing either knows that he has no authority or does not know or believes him to be a partner.

It is stated in *Lindley* on Partnership 10th Ed. at p. 751 that "an act of bankruptcy is a personal act or default, and is not to be imputed to anyone on the ground of agency. Consequently, an act of bankruptcy committed by one partner cannot be regarded as an act of bankruptcy committed by the firm".

And at p. 764 "An act of bankruptcy committed by one partner will not amount to an act of bankruptcy on the part of his co-partner unless it can be shewn to have been in point of fact, their act as well as his".

Five cases were cited before me:—*In re Crispin*[4]; *Ex parte Blain*[2]; *Cooke v. Vogeler*[3]; *Re Leong Cheong & Company*[11]; and *Re Abdulla*[1].

The first of these cases affords no assistance: it turned on whether the debtor had left England in order to delay and defeat his creditors, in other words, whether an act of bankruptcy had been committed by him. *Ex parte Blain*[2] turned on two points, first that the "debtor" was not a debtor within the meaning of the Bankruptcy Act of 1869 (though he apparently would be under the Act of 1914 and s. 3, sub-s. 3 (c) of the Bankruptcy Ordinance), second, to quote two short passages from the judgment of Brett L.J., at p. 529. "An act of bankruptcy must be the personal act or the personal default of the person who is to be made a bankrupt". I think that a man cannot commit an act of bankruptcy by a particular act of his agent which he has not authorised, and of which act he has had no cognizance". *Re Abdulla*[1] decided that a partner resident in India could be a debtor within the Bankruptcy Ordinance but that an act of bankruptcy committed in the Colony by his partner could not be imputed to him without proof that he had expressly authorised the Colony partner to commit the act of bankruptcy.

Cooke v. Vogeler[3] turned on whether the debtor was a "debtor" within the Bankruptcy Act of 1883 and whether what he did was an act of Bankruptcy, both questions were answered in the negative though, as Lord Wright M.R. in *In re The Debtors*[6] pointed out the first question would probably, since the Act of 1914, be answered in the affirmative.

Re Leong Cheong & Company[11] was a case in which Sproule J. held that a bankruptcy notice directed to a firm in its firm name and served on a partner at the principal place of business of the firm in accordance with Bankruptcy Rule 219 was deemed to have been served on all the partners so that non-compliance with the notice was an act of bankruptcy on the part of each partner actually or constructively served. But the learned judge added an important qualification "the theory of agency, as formulated by Brett L.J. in *In re Blain,* and as well supported by the earlier cases mentioned on p. 779 of *Lindley* (9th Ed.) and by the strictness of construction of clause (1) in a debtor's favour, would probably combine to exclude a non-resident or absent partner". Two of the partners in the present case are resident in India. An appeal from this judgment was dismissed by a majority. Judging from the report the main argument in the Court of Appeal was whether notice of a proposal to adjudicate a partner who was not personally served must be given to that partner and the majority of the Court thought that such notice need not be given. But the question whether an act of bankruptcy had been committed was also before the Court of Appeal and Reay J. ([1930] S.S.L.R. 155 at p. 175) shortly concurred in Sproule J's. view that an act of bankruptcy had been committed while Dinsmore J. was of the contrary opinion. Pritchard J., I think, agreed with Sproule and Reay JJ. because he quoted the passage on p. 31 of *Williams* 15th Ed. commenting on the English section which corresponds to s. 101 of the Colony Ordinance.

Leong Cheong's case[11] does not assist. The point was not whether one partner committed an act of bankruptcy through the agency of another but whether he had himself committed an act of bankruptcy for not obeying a notice with which he had been constructively served.

In the case before me there has been no judgment against the firm, the effect of which would have been to allow leave to be given to issue execution against each partner (O. XLVI, r. 8) and for this reason also much of the reasoning in *Leong Cheong's case*[11] is inapplicable.

I come back to what I think is a fundamental principle, namely, that an act of bankruptcy must be a deliberate personal act committed by the individual who it is sought to make liable for it or committed by another person with the individual's knowledge and approval and in my opinion the two partners in India, though they are debtors, have not committed the act of bankruptcy on which the petition is founded.

This accords with the judgment of this Court in *Re Moona Roona Kana*[12].

A receiving order may be made against a firm if it has committed an act of bankruptcy. In *ex parte Blain*[2] Brett L.J. said (1) that a firm as such cannot commit an act of bankruptcy. A firm as James L.J. points out at p. 533, is not a *persona.* The act of bankruptcy must be committed by the partners on its behalf and in such a case a receiving order can be made against the firm.

During the argument before me reference was made to the unreported decision of Barrett-Lennard J. in *Re Chop Ghee Lee*[9]. I have examined the Court file and find that the petition for a receiving order against the estate of Chop Ghee Lee set out as the act of bankruptcy "execution issued etc". An application was made for an order for substituted service and this application was supported by an affidavit in which it was sworn "The debtor's Chop Ghee Lee was a partnership concern and to the best of my knowledge one partner is Tan Seng See who is now residing at No. 7 Carpenter Street". Substituted service was ordered by advertisement and by service on Tan Seng See. On the 16th November, 1923, Mr. Justice Barrett-Lennard made a receiving order against Chop Ghee Lee. On the 24th June, 1924, the Official Assignee applied "for an order under Bankruptcy Rule 145 (s. 24, sub-s. 1) adjudging Tan Seng See, Tan Teow Boey and Sim Keng Tiam (partners) bankrupt".

Barrett-Lennard J. adjudicated Tan Seng See (the partner who was actually served with the petition) bankrupt, but in a written judgment he refused to adjudicate the other two because they were in foreign parts at the date of the act of bankruptcy.

The learned Judge thought s. 3, sub-s. 3 (c) of the Bankruptcy Ordinance *ultra vires* but he also applied *Ex parte Blain*[2] In *Re Abdulla*[1] I gave my reason for thinking s. 3, sub-s. 3 (c) *intra vires* but the point does not now arise. The position was that there was a receiving order against the Chop and an adjudication against one partner and it was not

suggested that the fact that only one partner had committed an act of bankruptcy rendered the receiving order bad.

In *Chop Nam Chiang Long*[13] a receiving order was made against the Chop, the act of bankruptcy being execution issued. Murison C.J. for reasons which did not appeal to me in *re Abdulla*[1] and which still do not appeal to me, thought *Ex parte Blain*[2] *no longer law* but he followed Barrett-Lennard J. and refused to adjudicate the partner who had never been within the jurisdiction. The receiving order was not set aside.

I have examined the Court records in this case too Singapore Bankruptcy No. 323 of 1925 and find that an appeal was lodged but owing to its having been discovered that the partner whom Murison C.J. had refused to adjudicate had not been served with notice of the application which the Official Assignee thought should have been given, the appeal was struck out. Sproule J. wrote the Order of the Court of Appeal which concluded "But we desire expressly to guard ourselves from being understood to endorse or accept the alleged ruling as to service except as an admission and for purposes of this order alone: and even more explicitly from any appearance of supporting Barrett-Lennard J's. ruling, which, speaking for myself, and in absence of argument on either side, I find difficult to understand". The second ruling referred to was the view that s. 3, sub-s. 3 (g) was *ultra vires.*

The implication of those cases is that a firm can commit an act of bankruptcy through one partner and that a receiving order can be made against the firm, without in any way affecting the status of the other partners or depriving them of any property other than their share in the assets of the firm, but in the two cases to which I refer the question of the validity of the receiving orders was not raised.

A firm can commit an act of bankruptcy by non-compliance with a bankruptcy notice founded on a judgment against the firm, and by virtue of s. 101 of the Bankruptcy Ordinance can have a receiving order made against it as a firm. This will have the effect of a receiving order against each of the persons who are partners in the firm at the date of the order (Bankruptcy Rule 221). *Williams* 15th Ed. 203.

By s. 24, sub-s. 1 when a receiving order is made, the debtor must be adjudicated and as a firm cannot be adjudicated (Bankruptcy Rule 223) it follows that it is the person who is a debtor who must be adjudicated. As the receiving order against the firm is a receiving order against each and every partner, s. 24, sub-s. 1 requires each and every partner who does not shew that he is in a position to offer composition to be adjudicated.

In my opinion this reasoning applies only to non-compliance with a bankruptcy notice and should not be extended to an act of bankruptcy like the present.

The dominant consideration is that an act of bankruptcy is a personal act or default and cannot be committed through an agent or co-partner without the authorisation and cognizance of the other partners. This being so, there cannot be a receiving order which under s. 24, sub-s. 1 automatically results in an adjudication order of all the partners unless all the partners have individually committed or expressly authorised the act of bankruptcy. To hold otherwise would be to hold that a person who had committed no act of bankruptcy could be adjudicated.

Bankruptcy notices, especially notices founded on a judgment, are in different positions. By Bankruptcy Rule 219 it is deemed to have been served on all the partners if it is served on one partner at the principal place of business in the Colony. Each partner is therefore obliged to obey the notice with which he is deemed to have been served and he commits an act of bankruptcy if he does not obey.

Whether this always applies in cases of what are really cases of substituted service on a partner may some day require consideration in view of the opinions expressed by the Court of Appeal in *re A Judgment Debtor*[10].

The strictness with which the rule is construed is illustrated by *The Debtors*[8].

I cannot adjudicate the two partners in India who have committed no act of bankruptcy and if I cannot adjudicate, then I cannot make receiving orders against them which would have the effect of adjudicating them.

I therefore refuse to make a receiving order which would gravely affect the partners who have not committed the act of bankruptcy.

However, I think that *The Debtors*[8] and *In re a Debtor*[7] although not exactly in point, authorise a receiving order being made against the partner who committed the act of bankruptcy of K.M. Shaik Mohamed, though such an order cannot be made against the firm.

If the petitioning creditor so desires I will allow him to amend the petition by inserting "K.M. Shaik Mohamed a partner in the firm of" before "K. Mohamed Ibrahim & Company" in the two places where it occurs and by amending paragraph 4 to read "That the said K.M. Shaik Mohamed (a partner in the said firm of K. Mohamed Ibrahim & Company) within six months before the presentation of this petition has committed the following act of bankruptcy, namely, that he on or about the 19th day of December, 1939, gave notice that the firm of K. Mohamed Ibrahim & Co. were about to suspend payment of its debts. The date of the act of bankruptcy is the 19th day of December 1939".

If this amendment is made within five days, there will be receiving and adjudication orders against the said K.M. Shaik Mohamed.

The interim receiving order against the firm is discharged.

There will be no order as to costs.

Order accordingly.

[APPELLATE CRIMINAL JURISDICTION]

TERRELL, J.A.

February 1, 1940.

JOSEPH D'CRUZ v. REX.

[SINGAPORE MAGISTRATE'S APPEAL No. 89 of 1939]

Post Office Ordinance (Cap. 71) s. 69—excessive sentence—inconvenience to witness irrelevant.

An appellate Court will always be unwilling to interfere with the discretion of a magistrate on the question of sentence unless the sentence is manifestly excessive or inadequate or unless the discretion has been exercised by the magistrate upon a wrong principle. In this case a charge was made against an accused of secreting a postal package and he was found guilty on such charge. No evidence to establish a case of theft was forthcoming. The magistrate sentenced the accused to 12 months rigorous imprisonment. In doing so he stated that the accused had deliberately stolen money from the postal package and he also treated it as an aggravation of the offence that by reason of the prosecution certain officials of the Post Office have had to be taken off their proper work in the Post Office to give evidence in Court.

Held, that the gravity of an offence is not enhanced by the inconvenience which may be caused to the witnesses at the trial.

Held also, that unless theft had been definitely charged and proved the magistrate had no power to assume theft by the accused and that accordingly the magistrate had exercised his discretion upon wrong grounds and that the sentence must be reduced.

MAGISTRATE'S APPEAL.

E. N. Griffith Jones (Crown Counsel) for the Crown.

A. J. Braga for appellant.

The facts and arguments sufficiently appear from the judgment.

Terrell, J.A.—The discretion of fixing a proper sentence is vested in the Magistrate who tries a case, and an Appellate Court will always be unwilling to interfere with such discretion unless the sentence is manifestly excessive or inadequate, or unless the discretion has been exercised upon a wrong principle.

The accused in the present case was found guilty of secreting a postal package, an offence punishable under s. 69 of the Post Office Ordinance (Cap. 71). The maximum penalty under that section is seven years. The section, however, includes several different offences, which may be divided into two groups:—

(a) theft or dishonest misappropriation, and

(b) secreting, destroying or throwing away, a postal package.

It is obvious that the offences under (a) are of a more serious nature than offences under (b).

In para. 4 of his grounds of judgment the learned District Judge says "Accused, a well paid officer, deliberately stole the $10 from the articles passing through his hands". It is sufficient to observe that the prosecution never charged the accused with theft, and that the evidence necessary to establish a case of theft was not forthcoming.

Then again in para. 3 of his grounds of judgment the learned District Judge says, "accused..... took these two officials (Stoddart and Gurr) off their work